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IN THE

SUPREME COURT

OF THE

UNITED STATES

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No. 72.

THE TELLURIDE POWER TRANSMISSION COMPANY AND L. L. NUNN, PLAINTIFFS IN ERROR,

vs.

THE RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR, ON MOTION TO DISMISS OR AFFIRM, AND ALSO FOR HEARING.

R. HARKNESS,
E. O. WOLCOTT,
J. F. VAILE,
Attorneys and Counsel for Defendant in Error.

(No. 18097)

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STATEMENT.

This action was brought by the defendant in error against the plaintiffs in error and Wm. W. Ferguson and L. Holbrook, to condemn their possessory right or claim to a strip of unsurveyed public land, for a railroad right of way.

Wm. W. Ferguson was in possession of a tract of land including the strip and was supposed to have a "squatter's" preference right of entry for a limited time after survey, and he had made improvements.

The Revised Statutes of Utah of 1898, chapter 65, entitled, "Eminent Domain," page 794, *et seq.*, commencing with section 3588, enumerates the uses for which the power may be exercised; states what property may be taken, the conditions precedent, and prescribes the procedure. This act is compiled from the compiled laws of 1888, volume 2, page 415, *et seq.*, section 3841, *et seq.*, and has been in force since prior to 1888, and is here copied from the Revised Statutes of 1898, for convenience of reference.

Section 3588 gives a long list of uses for which property may be taken in eleven classes or paragraphs, the fifth class including reservoir sites, and the sixth class including the right of way for railroads.

Section 3589 defines the uses for which a fee may be taken, which includes reservoirs, and provides that in all other cases (which include railroads) an easement is taken.

Section 3590 describes what property may be taken, and reads as follows:

> "1. All real property belonging to any person.
>
> "2. Lands belonging to the state or to any county, incorporated city or town, not appropriated to some public use.
>
> "3. Property appropriated to public use, *provided* that such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated.

"4. Franchises for toll roads, toll bridges, ferries, and all other franchises; *provided*, that such franchises shall not be taken unless for free highways, railroads, or other more necessary public use.

"5. All rights of way for any and all purposes mentioned in section 3588, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected, by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owners thereof when necessary; but such use of crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

"6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law."

Section 3591 gives the conditions precedent to the taking and it must appear,

"1. That the use to which it (the property) is to be applied is a use authorized by law.

"2. That the taking is necessary to such use.

"3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

In the sections following the procedure is specially pointed out.

Sec. 3593:

"All proceedings under this chapter must be brought in the District Court for the county in which the property or some part thereof, is situated. The complaint in such cases must be verified."

Sec. 3594. The complaint must contain:

"1. The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff.

"2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

"3. A statement of the right of the plaintiff.

"4. If a right of way is sought, the complaint must show the location, general route and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

"5. A description of each piece of land sought to be taken and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties."

Sec. 3595:

"All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint."

Sec. 3596:

"The court or judge thereof shall have power:

"1. To determine the conditions specified in section 3591; to determine the places of making connections and crossings, and to regulate the manner thereof and of enjoying the common use mentioned in the fifth subdivision of section 3590.

"2. To hear and determine all adverse and conflicting claims to the property sought to be condemned, and to the damages therefor.

"3. To determine the respective rights of different parties seeking condemnation of the same property."

As to damages it is provided:

Sec. 3598:

"The court, jury, commissioner or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

"1. The value of the property sought to be condemned, and all improvements thereof per-

taining to the realty and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

"2. If the property sought to be condemned constitutes only a part of a large parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

"3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

"4. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two of this section, the owner of the parcel shall be allowed no compensation, except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken.

"5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad between such railroad and other adjoining lands of the

defendant; and the cost of cattle guards where fences may cross the line of such railroad.

"6. As far as practicable, compensation must be assessed for each source of damages separately."

Sec. 3599:

"For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages."

Sec. 3600. This section merely provides for a new action if the title acquired by the first is found defective.

Sec. 3601:

"The plaintiff must within thirty days after final judgment pay the sum of money assessed, and, if the plaintiff is a railroad company, it shall also execute to the defendant a bond with sureties to be determined and approved by the court or judge, conditioned that the plaintiff shall build proper fences within six months from the time the railroad is built on or over the land taken.

In an action on the bond all damages sustained and the cost of the construction of such fences may be recovered."

Sec. 3602:

"Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants to be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money can not be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendants, if possession has been taken by the plaintiff."

Sec. 3603:

"When payments have been made (and the bond given, if the plaintiff elects to give one) as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified."

Sec. 3605 provides for the allowance or apportionment of costs in the discretion of the court.

Sec. 3606:

"Except as otherwise provided in this chapter, the provisions of this code relative to civil actions, new trials and appeals, shall be applicable to and constitute the rules of practice in the proceedings in this chapter."

The complaint (Transcript, top pages 1 to 4) was filed September 12, 1896, and the special summons was served on the 14th of September, 1896. (Trans., pp. 5, 6, 7.)

The plaintiffs in error, by petition and bond dated December 5th, and filed December 8, 1896, separately asked a removal, as to them, to the United States Circuit Court for Utah (Trans., pp. 8, 9, 10), and the transfer was denied December 23, 1896. (Trans., p. 10.) Plaintiffs in error then filed a copy of the record in the United States Circuit Court, and on motion of defendant in error the case was remanded. Order and opinion of U. S. Court. (Trans., pp. 625, 626.)

All the defendants filed a joint demurrer January 3, 1897 (Trans., p. 11), which was overruled January 16, 1897. (Trans., p. 12.)

February 2, 1897, the plaintiffs in error and L. Holbrook answered jointly, and W. W. Ferguson separately, but by the same attorneys. (Trans., p. 13 to 24.)

The death of W. W. Ferguson on or about February 19, 1897, was shown, and on the 16th of March, 1897, Sarah Ferguson, his widow, and Frederick and William Ferguson, his adult sons, his heirs at law, were made parties defendants, service on them ordered, and they appeared by separate attorneys and de-

murred on the 27th day of February, 1897, and on the 7th day of April, 1897, their demurrer was overruled. (Trans., p. 25 to 32.) The Fergusons, April 19, 1897, answered, and also set up matters called a cross-complaint, to which there was an answer May 15, 1897. (Trans., p. 33 to 39.)

Trial ensued, and by instructions the judge submitted to the jury the question of damages, and determined other questions. (Instructions, Trans., pp. 593-594.)

The jury returned a verdict for $1,025.30, and the court gave judgment. (Trans., pp. 48, 49, 50.) The judgment was set aside on motion of defendants to enable them to ask findings (Trans., p. 51), and findings were asked (Trans., p. 53 to 55), and refused, and the former findings and judgment reinstated. (Trans., p. 52.) On May 21, 1898, payment into the court and compliance with the conditions of the judgment being shown, the final order of condemnation was made. (Trans., p. 56.) The plaintiffs in error, separately, appealed to the State Supreme Court. The notice of appeal was directed to the railroad company, and also to the three Ferguson heirs and L. Holbrook, co-defendants with appellants, and admissions of service given by the attorneys for the Fergusons and Holbrook. (Trans., pp. 57-58.) This is the only appellate proceeding directed to the Fergusons or Holbrook. The trial court has found (Trans., p. 50) that Holbrook had disclaimed, and that it did not appear to which of the other defendants the damages belonged, and reserved to them the right to apply to the court as between themselves, and dismissed the action as to Holbrook. (Trans., p. 50.)

The judgment was affirmed in the State Supreme Court. The judgment and opinion appear. (Trans., p. 664 et seq.) The writ of error is granted on assignments of error appearing in the transcript, page 674.

The bill of exceptions, made on appeal to the State Supreme Court, is not full in the transcript, and some of the exhibits in it may lead to confusion, unless explained.

The bill was offered for settlement with a statement that it contained all the evidence in the case, and the plaintiff (defendant in error here) moved to amend, as shown by transcript, page 624. The items 1, 2 and 14 are specially "allowed," and when the bill was settled, the right of either party to use all the exhibits in evidence was given, and the settlement under this amendment was stipulated and made. (Trans., p. 642.) Several exhibits are annexed, but some are repetitions and not in order, and some have been omitted. The most important omissions are plaintiff's articles of association and its proofs of organization approved by the secretary of the interior under the act of Congress of March 3, 1875, Eighteenth Statutes, page 482, granting the right of way to railroads. As the corporate character and powers of the company and its compliance with this statute are found and adjudged, the omission is immaterial to the defendant in error, and there is no assignment of error or question here requiring any review on these points.

A prior action substantially between these same parties in the lower courts, and between exactly the same parties in this court, was finally disposed of in 175 U. S. Rep., 639. The action involved the possession of a strip of land for a right of way, adjoining lengthwise the Ferguson strip, and which one A. L.

Murphy occupied as part of a larger tract. The case and strip are referred to as the "Murphy" case and land, and the northerly end of the land is shown on the plat, Exhibit A, annexed to the complaint in this case. (Trans., bet. 4-5.) Murphy was not made a party, because he had granted the right of way as to his squatter's rights. The plaintiffs in error here were also the only appellants and plaintiffs in error in that case. The defendant in error put in evidence in this case, the judgment roll in the Murphy case and the similarity of names, pleadings and questions involved and decided are confusing, unless explained.

The complaint, the answer, the findings, conclusions of law and judgment, found in transcript, pages 642 to 662, are proceedings in the Murphy case.

In error to the Utah Supreme Court the petition, prayer for writ, writ of error, assignment of errors, citation and bond found in transcript, pages 632 to 637, are from the record of the Murphy suit, and were put in by defendant in error to show the writ was prayed March 1st and filed March 4, 1898, to a judgment rendered December 7, 1897, and the allowance purported to make the bond supersede the judgment. (Trans., p. 633.)

Western A. L. C. Co. vs. McGillis, 127 U. S., 776.

The testimony of D. C. Dodge, with correspondence, included in the transcript, pages 611 to 622, was also given in, and read from a transcript of, the Murphy case, and appears as an exhibit, instead of in the order of evidence.

The defendant in error has filed a motion to dismiss the writ of error, or affirm, but a separate brief is

not deemed necessary. The motion and notice are printed as an appendix to this brief.

BRIEF OF ARGUMENT.

I.

THIS CASE WAS NOT REMOVABLE TO THE FEDERAL COURT, AND WAS PROPERLY REMANDED TO THE STATE COURT.

The first four assignments of error are directed to the refusal to allow a removal to the United States court; to the exercise of jurisdiction to hear the case by the trial court, and to the affirmance of these rulings by the State Supreme Court, and these assignments necessarily involve the decision of the United States Circuit Court in refusing jurisdiction and remanding the record.

The motion to remove was made on the petition and complaint, before any demurrer or answer, and no supporting proofs were filed. The complaint (Transcript, page 1) showed the land was unsurveyed public land of the United States, in possession of Ferguson, who, by law, could only be a squatter, with a preferential right of entry; that by compliance with the act of Congress of March 3, 1875, the plaintiff had acquired the government title, or, at least, a permanent easement, subject only to paying damages to the occupant under section 3 of the act. Compliance with this act, or the nature of defendant's interest, was immaterial to the right to condemn, but affected conditions and damages.

The Utah statutes, sections 3594, 3595, supra, require that all known claimants be made parties. There was a single tract of land, the question so far as plaintiff was concerned was the entire damages to the occupant or occupants, and the number of claimants to the possession or damages could not, as to the plaintiff, make separable controversies. The right to remove depended on the statement of the cause of action in the complaint, and we refer to the opinion of the Circuit Court remanding the case and the authorities there cited. (Transcript, page 626.)

Other cases are in accord and among them,

Chesapeake & O. Ry. Co. vs. Dixon, 179 U. S., 131.

Even if the statements of the petition be considered, they do not show a separable controversy. The possession of Ferguson is not denied. As an occupant of the premises, holding under possessory title, he was a necessary party. No facts are stated to show that Ferguson was not interested in the whole case. The legal conclusion is stated that, by a certain contract, Ferguson's rights pass to the petitioners, but there is no statement that Ferguson had vacated, or that the petitioners were in the actual or exclusive possession. To state the whole controversy, Ferguson was the most necessary party, and the plaintiff could not be compelled to try its case in piece-meal.

Smedley vs. Smedley, 110 Fed. R., 255.

II.

THERE IS NOTHING IN THE RECORD TO INVOKE THE JURISDICTION OF THIS COURT.

The cause having been properly remanded to the state court, we assume that this court will not take jurisdiction to review the proceedings of the state courts, under the provisions of section 709 of the Revised Statutes, unless it appears: That a federal question specially set up existed; that its decision controlled the case, and was the sole or indispensable ground for the judgment; that it was wrongly decided and against the right claimed under it. We submit that none of these things exist.

The answer of the plaintiffs in error (Transcript, page 13), and the answer of Ferguson (Transcript, page 20), are similar in their denials, which are the only material parts, and similar, also, in their affirmative allegations as to the expectations and intentions of the plaintiffs in error to establish a valuable business, and in asking that condemnation be denied. The denial of the plaintiff's good faith and of the intention of plaintiff to build a railroad could be only an argumentative denial, otherwise made, of the necessity for condemnation.

The affirmative matter set up as ground for refusing condemnation is in substance:

That the plaintiffs in error contemplated establishing a large business by means of a dam in the Provo river, had made surveys and ditches, and commenced constructing a small dam for power to aid in making a large one, for which they had made surveys,

and were prosecuting the work on the smaller dam with diligence. That the large contemplated dam would flow the canon for a distance which (according to government subdivisions given) would be about five miles, and that they (the plaintiffs in error) had entered upon and were in actual possession of, and owned, many miles of government land in the canon for a reservoir, except the Ferguson tract, and had contracted for the purchase of that. No cross-complaint to condemn was filed, nor was any claim made for the adjustment of two or more public uses.

The theory of the answers seems to be that an intention in the future to build a dam in itself appropriated the water, and that the appropriation of the water, so made by intention, had the effect to appropriate the land, and that condemnation should, therefore, be denied.

No claim is made under any law or custom, nor is there shown any compliance with any law or custom, or that any water had, in fact, been appropriated.

There is neither in the answers, nor in any proceedings in the case, any claim under, or allegation of compliance with the laws of the United States relating to reservoirs. The act of March 3, 1891 (26 U. S. Statutes, 1101-2), was intended mainly for irrigation. By the act of January 21, 1895 (28 U. S. Statutes, 635), its provisions were extended to various industries, and finally, by the act of May 14, 1896 (29 U. S. Statutes, 120), its benefits were extended to electrical power companies to an extent not exceeding forty acres. Neither in the requests to instruct the jury (Transcript, page 43), nor in their requests for findings (Transcript, page 53) in the trial court, nor in the

assignments of error in the State Supreme Court (Transcript, page 603), nor in the answers or any proceedings prior to the petition for a writ of error from this court, did the plaintiffs in error make any claim of the existence of a federal question, or assert any right under any federal law or authority.

In this condition of the record, we submit that no federal question is involved, and there is nothing to invoke the jurisdiction of this court.

Erie Ry. Co. vs. Purdy, 22 Sup. Ct. R., 605.

Sweringen vs. St. Louis, 22 Sup. Ct. R., 569.

The petition for a writ of error from this court sets up error in alleged holdings:

First—That the plaintiffs in error did not have the right to locate and appropriate public lands (Transcript, page 672), and that thereby their rights, under the fourteenth amendment, were denied.

Second—That the decision violated their rights, under section 2, article 4, of the United States Constitution, which provides:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

Third—That the decision of both state courts was against the right of said parties to exercise a right specially claimed by answer under section 2339 of the Revised Statutes.

Fourth—In affirming jurisdiction in the state courts and denying the removal to the Circuit Court of the United States.

The assignments of error accompanying the petition (Transcript, page 674) repeat in different order the first, second and fourth grounds of the petition, but omit the third, unless it be claimed that errors assigned in giving or refusing instructions, by an indirect inference, argumentatively raise the question, without any specific claim under said section 2339 of the Revised Statutes.

The writ of error (Trans., p. 678) is based on and, in substance, repeats the first and fourth grounds of the petition, supra, and omits the second and third. By reference to the answer it will be seen no claim under section 2339 was set up and the third specification in the petition is a mistake.

That the right claimed must be set up in the courts below is held in the following cases, and cases cited, and further citations are unnecessary:

Chapin vs. Fye, 179 U. S., 127-130.

Erie Ry. Co. vs. Purdy, *supra.*

Sweringen vs. City of St. Louis, *supra.*

III.

THERE IS, IN FACT, NO FEDERAL QUESTION ARISING IN THE MANNER SUGGESTED BY THE ASSIGNMENTS OF ERROR, OR IN ANY WAY, AND THE STATE SUPREME COURT DID NOT DECIDE ANY SUCH QUESTION EITHER FOR OR AGAINST THE PLAINTIFFS IN ERROR.

The first assignment of error in the petition (Trans., p. 672) and amplified in the assignments of error, 12 to 17, inclusive (Trans., p. 676), is, in substance:

That the court erred in deciding the plaintiffs in error did not have the right to locate and appropriate public lands for a dam to generate electrical power;

That such decision was contrary to the protection of the fourteenth amendment; and likewise violated the rights of the plaintiffs in error under section 2, article 4 of the U. S. Constitution, which provides for equal privileges and immunities of citizens of the several states.

Neither the fourteenth amendment nor section 2, article 4, of the Constitution, describes who may locate or appropriate public lands for a dam, as a step toward the appropriation of water, nor defines the conditions under which such a right may be acquired, and the right, whether a personal or property right, must be acquired and exist under some law or custom before the protection of general constitutional guaranties can be applied. The assignment of error assumes the existence of rights, but refers to no laws giving them, or any state of admitted or proven fact establishing them, and throughout the entire case the plaintiffs in error carefully abstained from stating under what (if any) law or custom they claimed. There was a general supposition that they claimed under local laws or customs ratified by section 2339, but as previously mentioned, the statement in their petition for the writ (Trans., p. 673), that a claim under this section was made in the answer is a mistake. This section will be separately referred to, and the Supreme Court of Utah referred to it in the Murphy case, 16th Utah, 125, and the reference is repeated in its judgment in this case. (Trans., p. 667.)

It is true the State Supreme Court in this case (Trans., p. 669 et seq.) holds that the corporate plaintiff in error did not have the powers it claimed to exercise. This ruling was based on the failure of that corporation to comply with the local laws. The point was not necessary to, or the sole ground of the decision, but the conclusion of the court is clearly right. It did not hold that Nunn had no right, but that he acted as an agent for his corporate co-plaintiff in error, and did not exercise any personal rights. This is manifestly right, but not necessary to the judgment.

The decision in the state courts has been not to deny to the plaintiffs in error any rights acquired, under any law or custom, but to deny that they had, in fact, acquired any of the rights claimed by them.

The findings of fact and law and the judgment in the Murphy case (Trans., p. 653 to 661) give a full history of the case, and are put distinctly on the ground that the plaintiffs in error in this cause never acquired or had any possession, or right of possession, of the Murphy land, or any right to build a dam at Hanging Rock, or flow any lands above, or appropriated any water; except that they were allowed to build their dam not over 15 feet high at a point named. (In the third paragraph of the 13th finding in the Murphy case (Trans., p. 655) a distance which should be "about 900 feet" is erroneously printed "about 3900 feet.")

The judgment in this case (Trans., p. 48), based on the evidence and verdict, distinctly determines the issues against the plaintiffs in error, on the merits, as to their possession, or right of possession, of the lands in controversy, and as to their appropriation of any water so as to flow said lands. The opinion of

the Supreme Court of the state (Trans., p. 664 et seq.) recites approvingly the decision in the Murphy case (16 Utah, 125), holding that the plaintiffs in error in this cause had not shown a right to construct such a dam as was claimed, or to impound water or flow the land.

As a further ground of decision it is held that the judgment in the "Murphy" case is conclusive.

It is true that the trial judge, influenced by the fact that the bond on appeal purported to supersede the Murphy judgment, declined to receive it in evidence as a bar or conclusive on the merits, and received it as evidence of the good faith of defendant in error and its adoption of this line of survey, matters that were traversed by the answers; but the State Supreme Court held it was conclusive on the issues made and decided. The effect of the judgment is a question of law, and the record being in evidence, its legal effect could be declared, irrespective of the view taken by the trial court. Full legal effect can be given to a deed in evidence, though put in for a limited purpose.

Morgan et al. vs. Cox et al., 27 Fed. R., 36.

No assignment of error is made as to this decision, and it involves no federal question.

As a further ground of decision, the State Supreme Court holds that the Telluride company had no corporate power to pursue the business in which it was engaged, and that Nunn only acted as agent.

As to the Telluride company, the proof is that:

"On the 7th day of February, 1891, *The San Miguel Consolidated Gold Mining Company* filed

its articles in the office of the secretary of state of Colorado. (Trans., p. 638.)

"By article 2 its objects are declared to be: 'To acquire by purchase, lease or otherwise, mining property, together with water rights, power, ways, mills and mill sites, to develop, mine, work and utilize the same and to carry on a general mining business.'"

The same article gives the power to sell, lease, borrow money for improvements, etc. (Trans., p. 639.)

By article 6 the principal office is to be at Telluride, San Miguel county, state of Colorado, and the principal business was to be carried on in the counties of San Miguel, Montrose, Ouray, San Juan and Dolores, Colorado. It is, however, provided, that part of the business may be carried on in Boston, Massachusetts, and the principal office beyond the state kept there, and meetings of the board of directors held there.

The statute of Colorado, under which this company was organized is given (Trans., p. 662), and it is provided that:

"When any company shall be created under the laws of this state for the purpose of carrying on part of its business beyond the limits thereof, such certificate shall state that fact, * * *"

Amendments to the articles are allowed, but not so as to work a change in the object or purposes of the company. Sec. 477. (Trans., p. 662.)

Colorado corporations organized to construct ditches or flumes must give details in addition to those required by the general law. (Trans., p. 628.)

December 30th, 1895, the name of The San Miguel Consolidated Gold Mining Company was changed by amendment, which provided that:

> "The corporate name of said company shall be the Telluride Power Transmission Company." (Trans., p. 640.)

This amendment was filed in Colorado February 15, 1896. (Trans., p. 641.)

By answer and otherwise the company claims it has acted in Utah in and since 1894.

This alleged corporation never filed any proofs of its organization in Utah, or accepted its laws, or appointed an agent there. (Trans., p. 641.)

The Constitution of Utah went into effect January 4, 1896, and section 2, article 12 (in Revised Statutes of 1898, page 59), among other things, provides:

> * * *, "and no corporation in existence at the time of the adoption of this Constitution, shall have the benefit of future legislation without first filing in the office of the secretary of state an acceptance of the provisions of this Constitution."

Section 6, of the same article, provides:

> "No corporations organized outside of this state shall be allowed to transact business within the state on conditions more favorable than those prescribed by law for similar corporations organized under the laws of this state."

Section 9 of the same article:

> "No corporation shall do business in this state without having one or more places of business, with an authorized agent or agents upon whom process may be served; nor without first filing a certified copy of its articles of incorporation with the secretary of state."

Section 10, same article:

> "No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation."

Prior to 1896 the laws of Utah, existing for many years, required a foreign corporation to file its articles and appoint an agent in the state, but the only penalty attached was that, in default, it could not plead the statutes of limitation of Utah.

By an act approved January 4, 1896 (the same date on which the Constitution went into effect), and prior to this controversy, the old law, which stood as section 2293 of the Compiled Laws of 1888, was amended to read as follows:

> "All corporations, not organized under the laws of this state, before doing business within the state shall file with the secretary of state and with the county clerk of the county wherein their principal office in the state is situated, a certified copy of their articles of agreement, certificate of incorporation and by-laws, and, in case of alteration or amendment of said articles of incorpora-

tion or by-laws, shall file certified copies of such alterations or amendments with each of said officers, and shall also, before doing business within the state, by resolution of their board of directors, accept the provisions of the Constitution of this state, and also designate some person residing in the county in which its principal place of business in the state is situated, upon whom process issued by authority of or under any law of the state may be served. A copy of such resolutions shall be certified by the president and secretary, under seal of the company, and filed in the office of the secretary of state, and in the office of the county clerk of the county in which its principal office is situated; any such corporation failing to comply with the provisions of this section, shall not be entitled to the benefits of the laws of the state relating to corporations; Provided, That all foreign corporations doing business within the state at the time of the approval of this act, shall have sixty days from the approval of this act to comply with the terms of this section; and, Provided further, That the buying of bonds, notes, or other commercial securities for an investment shall not be construed as doing business within the state." (Laws of 1896, page 308.)

The present Revised Statutes of 1898, chapter 1, title 11, page 165, provide as follows:

Sec. 351:

"All corporations, not organized under the laws of this state, before doing business within the state shall file with the secretary of state and

with the county clerk of the county wherein their principal office in the state is situated, a certified copy of their articles of agreement, certificate of incorporation, and by-laws, and, in case of alteration or amendment of said articles of incorporation or by-laws, shall file certified copies of such alterations or amendments with each of said officers, and shall also, before doing business within the state, by resolution of their board of directors, accept the provisions of the Constitution of this state, and also designate some person residing in the county in which its principal place of business in the state is situated, upon whom process issued by authority of or under any law of the state may be served. A copy of such resolutions shall be certified by the president and secretary, under seal of the company, and filed in the office of the secretary of state and in the office of the county clerk of the county in which its principal office is situated."

Sec. 352:

"Any such corporation failing to comply with the provisions of the foregoing section shall no be entitled to the benefits of the laws of this state relating to corporations; and any person acting as agent of a foreign corporation which shall neglect or refuse to comply with the foregoing provisions, shall be deemed guilty of a misdemeanor, and shall be personally liable on any and all contracts made in this state by him for and in behalf of such company during the time that it shall remain so in default; *provided*, That this sec-

tion shall not be held to apply to persons acting as agents for foreign corporations for a special or temporary purpose, or for a purpose not within the ordinary business of such corporations, nor shall it apply to attorneys at law as such."

In the Revised Statutes of 1898, title 20, chapter 1, page 289, entitled "Fees of State Officers," the following is a subdivision of section 965, relating to fees of the secretary of state:

> "For receiving and filing each original or certified copy of articles of incorporation, he shall charge and collect the sum of twenty-five cents on each one thousand dollars of capital stock of any company or corporation; *provided*, that in no case shall the aggregate sum charged and collected from any corporation exceed twenty-five hundred dollars; *provided*, further, that the same sums shall be charged and collected for receiving and filing certified copies of articles of incorporation or of amendments increasing the capital stock of foreign corporations hereafter organized for the purpose of operating property or carrying on business in this state."

We have, then, a mining company of Colorado not authorized to carry on any other business, or to carry on business outside of its state, except in Boston, changing its name and professing to act as an incorporation with other powers and objects in Utah. It does not accept the Constitution, or in anywise comply with the laws of Utah, or pay the fee or license on its capital stock and attempts, in violation of the

Utah Constitution, to do business on terms more favorable than are allowed to domestic corporations. It had no existence in Colorado except as a mining company, and could not acquire an existence for other purposes by going to Utah and not complying with its laws. Certainly it is manifest that the corporation plaintiff in error can not invoke the provisions of section 2, article 4, of the Federal Constitution, and authorities to that effect are not needed in this court. We, therefore, submit that, even if the validity of the judgment of the State Supreme Court depended on this point, the decision is right.

As to the plaintiff in error, L. L. Nunn, the decisions in the state courts are the same, to wit, that he had not shown any possession, right of possession, or interest in the lands; had not appropriated any water or acquired any right to flow the land by such a dam as he alleges he intended to make. There was no decision affecting his abstract rights as a citizen, or denying him the privilege of exercising his rights. There is only the decision that he had not, in fact acquired the rights which he claimed. The Supreme Court of this state confirms the trial courts, and as a separate ground of judgment holds that Mr. Nunn was concluded by the Murphy case, to which he was a party, and to this ruling he assigns no error; and as a still further ground of decision that court held that in the matters in which he was a claimant (except as to the lower diverting dam and power) he was acting as manager of, and for his co-plaintiff in error, and had no personal right. In this, there is no right denied him, or any holding that he could not exercise any and all rights of a citizen; but merely that he,

personally, had not complied with the conditions required to give or vest the right.

The statement in the opinion of the State Supreme Court, as to Nunn's position and interest (Transcript, pages 670-671), is borne out by all the evidence and sufficiently shown by his own testimony. (Transcript, page 303.)

As to the assignment of error, based on section 2339 of the Revised Statutes, we have noted that no right under it was set up or claimed. This statutory provision is not a grant of any right, but is only a recognition of rights vested and accrued by priority of possession, and supported by local laws and customs, and decisions of courts, and in every case the first and principal question is as to a compliance with such laws and customs.

Pomeroy on Riparian Rights, sections 13 to 16.

Basey vs. Gallagher, 20 Wall., 670.

Atchison vs. Peterson, 20 Wall., 507.

Broder vs. Water Co., 101 U. S., 274.

Whether Mr. Nunn had or had not complied with such local laws and customs was a question of fact in the state courts, and remains such in this court.

Erie Ry. Co. vs. Purdy, and Sweringen vs. St. Louis, supra.

The plaintiffs in error have never referred to any local law or custom supporting their contention that their acts were sufficient for the appropriation claimed.

In 1880 a territorial act was passed using the words of the act of Congress and defining how rights could become vested or accrued. The act went into the Compiled Laws of the territory in 1888, volume 2, page 132, et seq., and remained in force until 1897, and until after this suit was brought. Section 2780, in the compilation of 1888, reads:

> "A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances:
>
> > "First—Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply.
> >
> > "Second—Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years."

Section 2788:

> "All persons shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction and repair of all necessary reservoirs, dams, water gates, canals, ditches, or flumes, other means of securing and conveying water for any

necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall, in all cases, be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property."

A new and more specific act was passed in 1897, and is in the Revised Statutes of 1898, title 33, section 1261, et seq. It is only material as tending to show what had been considered necessary, and as an adoption of prior customs in such cases. The provision for the notice is:

Section 1268:

"Any person hereafter desiring to appropriate water must post a notice in writing in two conspicuous places, one copy at the nearest postoffice to the point of intended diversion, and one copy at the point of intended diversion, stating therein:

"First—The number of cubic feet per second claimed.

"Second—The purpose for which it is claimed, and the place of intended use, and, if for irrigation, the number of acres to be irrigated.

"Third—The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it.

"Fourth—The date of the appropriation.

"Fifth—The name of the appropriator."

The act, in other sections, provides that the notice must be verified and recorded; work commenced within forty days and pursued with diligence; and that upon completion and diversion of the water, a relation to the time of the notice is acquired. On failure to comply with the act no such relation, against subsequent appropriators is acquired. The statute is copied from California, and on this point construed in

Rincon W. & P. Co. vs. Anaheim U. W. Co.,
115 Fed. R., 543.

There was no local law or custom giving a vested or accrued right, until an actual diversion of the water. As between two claimants, both resting on an intention to divert, a prior right could be acquired by public notice defining the limits, extent and purpose of the intended appropriation, followed by diligent work suitable to carry out the intention. A relation to the notice and time of beginning work could thus be obtained by custom upon general equitable principles, as between adverse claimants. This is quite different from the claim that an unlimited appropriation can be made resting on a concealed intention to appropriate water at some future time, if the course of business should make it desirable, and to such an extent that an act of Congress can not give the right of way over public lands upon the payment of damages to the occupant.

Under the customs ratified by the act of Congress a notice was necessary.

Kinney on Irrigation, section 157, page 242.

Pomeroy on Riparian Rights, sections 47, 50, 51, 52.

Osgood vs. Eldorado Co., 56 Cal., 571.

In this case the state courts in the findings and judgments previously noted have decided the plaintiffs in error made no such appropriation of water as was claimed, hence had no right in or to the land or to flow it by means of a dam, and that such a use would be unreasonable. In this case the State Supreme Court holds the Murphy case is conclusive, and as previously noted, there is no exception or assignment of error on this point.

In view of what is said in the Murphy case by this court, we will not further refer to section 2339.

Telluride P. T. Co. vs. The R. G. W. Ry. Co., 175 U. S., 639.

Even if there had been an appropriation of the water of the river (the use of which does not concern the defendant in error), such an appropriation would not, by its own force, carry the right to flow five and one-half miles and 269 acres in a narrow canon, regardless of public and private rights, and without any steps to acquire the land under any law. Pomeroy on Riparian Rights, section 50, page 79, says land is

appropriated in one way, water in another, and that digging a ditch is not an appropriation of a mill site.

See, also:

Robinson vs. Imperial M. Co., 5 Nev., 44.

We have previously noted that there was no compliance with the acts of Congress in regard to reservoir sites.

The assignment of error based on an alleged want of jurisdiction of the state courts has been sufficiently noticed.

The remaining assignments of error, 5 to 11, inclusive, are based on alleged errors in giving and refusing instructions, and only by a remote argument, if at all, can be connected with a right under any United States law, or even inferentially raise a federal question, and they were right with reference to the merits, independent of any federal question.

The assignments of error, fifth to ninth, inclusive (Transcript, pages 674, 675), are all based on the theory that the jury should determine all the facts and conditions precedent to condemnation and render a general verdict, and were therefore properly refused. They state some of the conditions of an appropriation of water, but in many respects are inapplicable to the facts shown by the evidence. The requests need not be discussed, because they refer to the jury matters to be decided by the judge, and have no reference to any right under section 2339, but refer solely to the inquiry as to what is a compliance with local laws and customs to entitle the appropriator to the benefits of that section.

The assignments of error, numbers ten and eleven (Transcript, pages 675, 676), relate to instructions given as to damages (Transcript, pages 593, 595), and the instructions are right. The settlement upon the land by Ferguson gave him no interest that prevented the defendant in error from acquiring the right of way under the act of Congress of March 3, 1875, upon paying for the squatter's improvements under section 3 of the act.

Buxton vs. Traver, 130 U. S., 232.
Quinlan vs. Conlan, 104 U. S., 420, 425.
Frisbee vs. Whitney, 9 Wall., 187.
Yosemite Case, 15 Wall., 77.

Ferguson deeded to Nunn pending the action, but Nunn never occupied and the deed conveyed nothing unless the mere right to enter and initiate a homestead occupation. Cases supra. The Utah statute, cited supra, fixes the date of the service of the summons (in this case September 14, 1896) as the time at which damages accrue and are to be computed. The court having found that the plaintiffs in error had no right to flow the land, they could not claim any damages to such right. This instruction does not relate to the value of the possessory right, for any use to which the land was suitable in its condition, but only to the want of value of a non-existing right in the plaintiffs in error individually. The damages to the possessory right of the land were defined to be the value "with reference to their market value for the uses to which they could be put as lands in their condition." (Transcript, page 594.)

It is undisputed that the land was unsurveyed public land; that Ferguson was in possession until

the time of his death, and his heirs afterward, and that neither of the plaintiffs in error ever was in possession. As between them and the defendant in error, the latter being the owner subject only to the payment of damages to an occupant who should be in possession with a view to initiate a homestead, the plaintiffs in error were not, as a matter of law, entitled to any damages. If by the deed of Ferguson to Nunn, pending the action (Transcript, page 321), and after the damages had accrued to Ferguson, Nunn acquired any right to the damages as against Ferguson, it was a matter of contract between them. It did not and could not affect the possession of the land, until Nunn should take possession with a view to in good faith initiate a homestead, and it in no wise affected the defendant in error, or its cause of action. The deed of Ferguson was void unless as an authority to Nunn to enter and take his improvements, and the deed in December was not in itself an assignment of damages, which, under the Utah statutes, accrued September 14, 1896.

In the judgment (Transcript, page 50), the court decided that it was not shown which of the claimants should receive the damages, and reserved their right to come into court for a distribution.

IV.

THERE IS A DEFECT OF PARTIES TO THE WRIT OF ERROR SUED OUT OF THIS COURT.

The writ of error is to the affirmance of a joint judgment against the plaintiffs in error, and others who neither join in error, nor have been served. It is

not necessary to make any further statement of the facts. As to the defendant in error, there was a single cause of action affecting only the question of the entire damages to the possessory right of a single strip of land. Whatever the separate claims of the defendants below, as to a division of the damages between themselves, may have been, or whether Nunn, by his deed from Ferguson, pending the action, acquired any contract right to the damages, are questions not affecting the defendant in error. It had to show a right to condemn and the entire damages to the possessory interest of the land, and if its claim under the act of Congress was valid, there was no divisible or separate interest or title in the plaintiffs in error to the property in question. The defendant in error could only treat Ferguson as the owner of this interest, because he was the actual occupant, and under the statute join and bar the plaintiffs in error, because they were claimants of the possession and to the damages.

When the defendant in error paid the damages into court and took the final order of condemnation, its interest and duty of action in the case ceased.

Davidson vs. Texas & N. O. Ry., 67 S. W., 1093.

In fact, it never had any interest in this question of distribution, but only to get a joint judgment upon payment of gross damages.

It appears by the record that the Ferguson heirs did not appeal to the Supreme Court of the state, and have not joined in the writ of error sued out of this court. The service on them of notice of appeal,

by the present plaintiffs in error, to the Supreme Court of Utah, was in the nature of an adverse proceeding, and they have neither been severed by summons or asked and refused to join either in that appeal or this writ of error. The result is that they and also the defendant in error are bound by the judgment, and in case of a reversal as to the plaintiffs in error, the defendant in error must litigate separately with them, a cause of action which as to it is joint and inseparable, and thus be subject to a separate claim for damages, which it has once paid, in accordance with the law.

Masteron vs. Herndon, 10 Wall., 416.
Estis vs. Traube, 128 U. S., 225.
Mason vs. United States, 136 U. S., 581.
Hardee vs. Wilson, 146 U. S., 179.
Nash vs. Harshman, 149 U. S., 263.
Inglehart vs. Stansbury, 151 U. S., 68.
Sipperley vs. Smith, 155 U. S., 86.
Beardsley vs. A. & L. Ry., 158 U. S., 123.

V.

THE DECISIONS IN THE COURTS BELOW ARE RIGHT ON THE MERITS, WHETHER CONSIDERED UNDER STATE OR FEDERAL LAWS.

We have above referred to this proposition with reference to federal questions, and the contention that some federal question is by inference and remote deduction involved. We assume the court will not willingly listen to any lengthy argument on the general

merits not involving a federal question; but in view of the nature of the assignments of error, which are claimed to raise federal questions, we are uncertain where the contention will end, or whether it may not be extended to involve the whole merits of the case as it stood for decision in the state courts.

With this excuse we add a brief statement which may tend to apply the evidence to the questions to which it relates, and there is no substantial conflict when so explained.

The evidence applies to points covering six or seven miles of the Provo River canon, which is narrow and the only opening and route of public travel across the Wasatch range of mountains from Provo and the valley of Lake Utah for many miles along the range. Hanging Rock, the point where it is claimed the high dam was to be erected, is made the initial point for distances, and going down from there a little more than 1000 feet there is a point called Middle Rock, near which plaintiffs in error contemplated a small dam. They finally located and made their diverting dam 500 feet further down the river, and from there, by a flume, they divert the water to their power house, which is 8000 feet or more below their diverting dam. Continuing down the river from the diverting dam about 4300 feet, there is a point called Bridal Veil Falls, and about 200 feet further down are the old county bridge and Thayer's house, points named in the testimony. Hanging Rock, Middle Rock and the diverting dam are all on or opposite the right of way involved in the "Murphy" suit, which strip extends to a point about 900 feet above Hanging Rock. The Ferguson strip, now involved, lies adjoining the Murphy strip in continuation up the canon. The

South Fork of the river comes in about 3300 feet above Hanging Rock, and the North Fork still further up. That the plaintiffs in error made surveys of many lines and discussed plans for a water power from late in 1894 until the spring of 1896 is unquestioned. They first posted a notice on the south side of the river, near Bridal Veil Falls, and about one and a quarter miles below Hanging Rock, and this did not give any notice of a dam, or any obstruction, unless by inference, sufficient to divert the water, or flow any land, and it is the only notice in the case, except as will be noted. (Trans., p. 638.) Between this time and March, 1896, they ran several trial lines, at various levels, and discussed the question of a selection of means. Among other plans, a canal 60 feet above the river at Middle Rock (the initial point of their surveys), and which was evidently intended to tap the river near the North Fork, and on this they did a little work in 1895. Another plan, and the one finally adopted, was to make a diverting dam about 500 feet below Middle Rock and about 1500 feet below Hanging Rock, and carry the water in a steel flume to the power house. On March 24, 1896 (the very day the railroad surveyors started to locate their line), they contracted for this flume. (Trans., pp. 609, 610.) Their work has all been on that plan. We have said the Holbrook notice, put more than a mile below, is the only one. On the 27th day of March, 1896, after the railroad surveyors had been out three days, but before they reached Middle Rock, below which work for the flume was in progress, a surveyor for plaintiffs in error, and in Nunn's name, put a notice 60 feet above the level of the river and opposite Middle Rock, and

also put up a copy at Deer Creek, about seven miles further up, a point which had been considered in their discussion of plans. A copy of this is in the findings in the Murphy case (Trans., p. 657), and perhaps elsewhere in the transcript.

Nothing was done under this notice except to start from that point a survey of the contour of a reservoir, but the survey was not completed, and Nunn, when it came to his attention, stopped the survey and declared this notice a mistake. (Transcript, pages 308 and 217.) The surveyor was then ordered to make a contour of a reservoir for a dam eighty-five feet high at Hanging Rock, 1,000 feet up the river from Middle Rock, where he had started the sixty-foot contour, and he commenced work May 1, ending about May 25th, setting stakes at the angles of the contour 200 to 400 feet apart, and marked the stakes "Water level Provo Canon Reservoir." (Transcript, page 207.) These stakes are the only notice given of any appropriation of land or water at Hanging Rock, and did not indicate anything except an imaginary water level.

During this time the work on the flume line from the diverting dam 1,500 feet below continued with a considerable force, and most of the surveyor's work was there. (Transcript, page 205 et seq.) Their stake marked "top of dam," near the diverting dam, was standing.

In the mean time and before May 1st the railroad survey was practically completed, and soon afterward grading was commenced on the Murphy land on the north side of the river. Prior to July 8th the defendant in error had completed a survey for a change of line to the south side of the river for about four miles,

and on the 11th of July quit work on the north side and commenced on the south side near Hanging Rock, and continued work until stopped. A point has been made that its right of way map, filed for approval under the act of Congress, described for this distance a line on the north side of the river, and that the amended map was not filed until December, 1896, and hence it is said the railroad company had no appropriation until this map was filed. No map was necessary.

J. & N. Ry. Co. vs. Jones, 177 U. S., 125.

The change and beginning of work was prior to any act or occupancy of plaintiffs in error, giving any right, and at most it was a matter between defendant in error and the government.

Washington & I. R. R. Co. vs. C. D'A. R. & N. Co., 160 U. S., 77, at 97, 98.

It is clear that the plaintiffs in error contemplated and were doing and continued work on a plan to divert water to their flume by a dam not over fifteen feet high at the point of diversion, and which was designated by a stake marked "top of dam." There was no notice, or work to give implied notice, at any other point, except the recorded Holbrook notice a mile below and near Bridal Veil Falls. When the railroad survey commenced, as an obstructive measure they put up a notice for a sixty-foot dam at Middle Rock, and commenced a survey of the contour of a reservoir. This point and survey were abandoned, and then, without any notice, act or other work,

they made a survey for a reservoir requiring an eighty-five-foot dam, marking the angle post as above stated. While pursuing their claim of diversion by a small dam below, the claim that they at some time might want a higher dam, existed only in a scheme for the future, which might or might not be attempted; and that scheme was only discussed by the parties to it, and there was no public knowledge or notice of the contingent scheme.

The testimony of L. L. Nunn (Transcript, page 296 et seq.) substantially shows nothing was done at Hanging Rock except the contour survey made after the railroad was practically located. He speaks of cutting brush and making test pit holes between the hanging rocks, and there is some evidence showing work done in clearing off the rocks. It is shown conclusively that the brush was cut, and the work to make pit holes and on the rocks done after the railroad graders had crossed to the south side in July, 1896. That the pit holes were made in "borrow pits" left by the graders on the north side, and that to get to the south rock the men, who worked clearing it for plaintiffs in error, crossed the river on a bridge made by the graders.

In short, it was obstruction work, to bring on a conflict with the graders and stop their work, which soon occurred. (Transcript, pages 505 to 508 and 520 to 522.)

Nunn claims he needed more power, but he was only enjoined in the Murphy suit from raising the water more than fifteen feet at his diverting dam, and he only made it six feet above the water level of the river. (Transcript, page 302.)

There is very little conflict in the evidence in regard to appropriation of water at Hanging Rock by a dam, or in regard to any possession of the land. The confusion exists in applying the evidence to the proper subject. Mr. Nunn and others connect the plan for a diverting dam where it is, and the work done to perfect it by means of a flume, to not only that work, but make the different problematical and visionary scheme of an eighty-five-foot dam, which existed only in imagination, a part of one entire plan, and they describe work and expenditures on one as applicable to both. In this way, unless the place and purpose of the work are separated, the bearing of the evidence may not always be clear. On the argument in the State Supreme Court, there was used, by consent, a map, not in evidence, but intended as a plat of the evidence, showing the river, the railroad survey and the location of the important points and distances referred to in the testimony, for two or three miles, and this, if consent to use it in this court be given, will aid very much in applying the evidence to the case.

The trial court, against continuous objection, allowed the plaintiffs in error to give as evidence of damages, estimates of the power they expected to obtain; its cost, that the power was saleable, and would bring large profits. There was not a word of legal evidence of damages given by them. In like manner and against like objection, they were allowed to give evidence that a railroad could be built with a dam at Hanging Rock of twenty-five feet, and of the power such a dam would give, and finally made the offer found in transcript, page 592. There was no claim that they had ever appropriated water for or contem-

plated such a dam. Their own surveyor said (Transcript, pages 236 and 256) that he never heard of such a dam until in court; the defendant in error had made no survey or appropriation of land for such a right of way; the plaintiffs in error could not give it; they had not asked to have any public use apportioned, and the court had no power to act. Such a dam would change the railroad right of way for miles, and render useless the connecting rights of way acquired, annul the judgment and injunction in the Murphy case, and, beside the expense, throw open the whole question of right of way for miles.

The offer may have been a good strategic move, but was wholly immaterial as an offer of compromise or otherwise.

We therefore submit that:

The case was properly remanded to the state court, and the jurisdiction of that court was unquestionable:

No right under any federal law was set up or claimed:

The writ should be dismissed or the case affirmed, because no federal question is involved, and the writ is to review a joint judgment against the plaintiffs in error and others who have not joined or been served:

The judgment should be affirmed, because if any federal question is involved it is not the sole or an essential ground of the decision, and the decision of such question is right and denies no right or immunity to the plaintiffs in error:

Finally, that the decision is right on the merits, under either state or federal laws.

Respectfully submitted,

R. HARKNESS,
E. O. WOLCOTT,
J. F. VAILE,
Attorneys and Counsel for Defendant in Error.

APPENDIX.

MOTION TO DISMISS OR AFFIRM.

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 72.

THE TELLURIDE POWER TRANSMISSION COMPANY, AND L. L. NUNN, IMPLEADED, ETC., *Plaintiffs in Error,*

vs.

THE RIO GRANDE WESTERN RAILWAY COMPANY, *Defendant in Error.*

And now comes the defendant in error and upon the record and the transcript thereof, moves the court for judgment dismissing the writ of error herein and the cause, or for affirmance of the judgment with costs, on the grounds that:

There is no federal question involved, and the decision of the court is not against any right, title, privilege or immunity set up or claimed by the plaintiffs in error under the Constitution, or any law or treaty of the United States.

The writ of error is to a joint judgment against the plaintiffs in error and Sarah Ferguson, Frederick Ferguson, and William Ferguson, as heirs at law and successors to W. W. Ferguson, deceased, and L. Holbrook, and the writ of error is sued out and prosecuted by The Telluride Power Transmission Company and L. L. Nunn, without any severance, or the consent or refusal to join of their co-defendants.

The questions on which the jurisdiction of this court is alleged and depends are frivolous, and the writ of error taken for delay.

Dated September 8th, 1902.

E. O. WOLCOTT,
JOEL F. VAILE,
Denver, Colorado.
Attorneys and Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 72.

THE TELLURIDE POWER TRANSMISSION COMPANY, AND L. L. NUNN, IMPLEADED, ETC., *Plaintiffs in Error,*

vs.

THE RIO GRANDE WESTERN RAILWAY COMPANY, *Defendant in Error.*

To The Telluride Power Transmission Company and L. L. Nunn, Plaintiffs in Error, and Brown & Henderson, their Attorneys and Counsel:

You are notified that the annexed and foregoing motion to dismiss or affirm will be brought to a hearing before the court at the October term thereof, and when the said cause is reached for hearing on the calendar of that term.

Dated September 8th, 1902.

E. O. WOLCOTT,
JOEL F. VAILE,
Denver, Colo.,
Attorneys and Counsel for Defendants in Error

Personal service of a copy of the foregoing motion and notice of hearing is admitted.

Dated September 8th, 1902.

ARTHUR BROWN,
HENRY P. HENDERSON,
Attorneys for Plaintiffs in Error.